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LARCENY — ELECTRICITY AS THE SUBJECT OF.—[Illinois] Defendant was indicted under the larceny statute (Ill. Rev. Stat. (1937) c. 38, §387) for having diverted 70,601 kilowatt-hours of electric energy around the meter installed by the power company for the purpose of registering the amount of electricity used. A motion to quash the indictment was granted on the ground that electricity was not the subject of larceny. On appeal it was held that the motion to quash should have been denied since electricity, although not the subject of larceny at common law, is such under the statute. *People* v. *Managas,* 367 Ill. 330, 11 N. E. (2d) 403 (1937).

Whether, under the common law definition of the crime, electricity can be the subject of larcenous asportation was first decided by the courts of this country in an unreported case in the Court of First Instance for the Judicial District of Manila (*United States* v. *Jose de Leon,* Feb. 3, 1910) in which a statute which restated the common law was held to comprehend electrical energy. This conclusion was also arrived at in *United States* v. *Carlos,* 21 Philippine Rep. 553 (1911). No other decisions on the matter have been found in either the United States or England, principally due to the prevalence of statutes expressly making meter tampering a misdemeanor. E. g., Ariz. Rev. Code Ann. (Struckmeyer, 1928) §4761; Ill. Rev. Stat. (1937) c. 38, §292; W. Va. Code Ann. (1937) §5985; Wis. Stat. (1937) §98.25 (2).

In the instant case the court was confronted at the outset by a dictum in *Moline Water Power Co.* v. *Cox,* 252 Ill. 348, 357, 96 N. E. 1044, 1047 (1911) where the court said in reference to electrical energy, "at common law it could not be the subject of larceny, which must be of goods and chattels . . ." The court there construed "goods and chattels" to include only "tangible entities," and held that electricity was not within that limitation, concluding that it could not be stolen at common law.

Rather than attack this prior dictum the court in the instant case saw fit to base its conclusion upon the supposed distinction between the scope of the larceny statute and that of the crime at common law. It was pointed out that the statute specified unreservedly that "personal property" should be the subject-matter of the crime, and cases supporting in

other connections the proposition that electrical energy may be personal property were cited: *Ashwander* v. *T. V. A.*, 297 U. S. 288 (1935) (electrical energy susceptible of disposition as "property belonging to the United States" within the meaning of U. S. Const. Art. IV, §3); *Hetherington* v. *Camp Bird Mining Co.*, 70 Colo. 531, 202 Pac. 1087 (1921). See also *Sixty-seventh South Munn, Inc.* v. *Board of Commissioners*, 106 N. J. L. 45, 147 Atl. 735 (1929).

If it be assumed, as the court in the instant case did, that at common law electricity was not the subject of larceny, the court's conclusion that electricity now may be the subject of larceny under the Illinois statute seems a rather dubious construction. It is doubtful whether the term "personal property" as thus used in the statute was intended to be employed in its broadest sense since in the same section the legislature found it necessary expressly to provide that the felonious asportation of such intangible personal property as "any bond, bill, note, receipt or any instrument of writing of value to the owner" should be larceny. Furthermore, many of the judicial definitions of common law larceny use the same phrase, "personal property." E. g., *State v. Brewington*, 25 Del. 71, 78 Atl. 402 (1910). It thus appears very questionable whether the statute was intended to expand the scope of larceny beyond the new categories expressly set out, and under the rule that criminal statutes are to be construed in the manner most favorable to the accused it is difficult to justify the interpretation.

Rather than to thus strain the scope of the statute the court might better have re-examined its dictum in the *Moline* case, supra. The court's assertion there that larceny at common law extends only to "tangible entities" seems unfounded. The true distinction between the sorts of personality which are, and those which are not the subject of larceny is brought out by a quotation from 36 C. J. §8, set out in *People* v. *Ashworth*, 222 N. Y. S. 24, 28 (1927), in which it is indicated that only personalty of purely mental (e. g., legal rights, good will, use of property, etc.), as distinguished from physical existence is exempted from common law larceny. The only statement found which, in defining larceny, supports the distinction settled upon by the Illinois courts (i. e., subdividing personalty into the "tangible" and the "intangible") is that set out in 25 Cyc. 12 which would require the property to have "length, breadth, and thickness." The authority there cited do not support this declaration. The numerous cases holding that heating gas is subject of theft further belie its veracity. In *United States* v. *Carlos, supra*, it was said at 560, "The true test of what is the proper subject of larceny seems to be not whether the subject is corporeal or incorporeal."

But even if it be assumed that the court is correct in this assertion, still it does not follow that electricity does not come within the realm of "tangibility." The only strict concept which the requirement would seem to evoke is that of the physicist's "mass." Modern physicists of the greatest note are now in agreement that there is no essential distinction between the classical physicist's twin concepts of mass and energy. Einstein and Infeld, The Evolution of Physics (1938) 208. Thus it is

arguable that the alleged requirement of "tangibility" is fulfilled even where the only property involved is pure energy.

A second attempt to bring the case within the "tangibility" requirement by pointing out that the free electrons composing the stolen current have a measureable mass (9.035×10^{-28} gm., at rest) was essayed by the state. The argument is easily answered, however, by the fact that the defendant only intended to appropriate the electrons temporarily during the interval wherein they passed through that part of the circuit which lay on defendant's property and thence back to the power company's transmission lines—a matter of only a few minutes or hours. (Contrary to the expert witness's testimony the electrons composing conventional electric currents flow very slowly, although the effects of their motion travel with speeds of the same order as that of light. Morecroft, Principles of Radio Communication (3d ed., 1933) 12.) Such technological reasoning as the above is subject to summary dismissal in some jurisdictions on the ground that laws are written "in the language of the people, and not in that of science." *Commonwealth* v. *Northern Electric Light and Power Co.*, 145 Pa. 105, 118, 22 Atl. 839, 840 (1891).

Since the mere connection of the "jumper" constitutes of itself merely a trespass, there being no completed crime until asportation is accomplished by the drawing of current, there is presented the interesting question as to whether each interruption of the use of the illicit electricity would not sever the entire taking into distinct offenses each of which would undoubtedly in this case have amounted merely to petty larceny. However, in *Woods* v. *People*, 222 Ill. 293, 78 N. E. 607 (1906), a case of larceny of gas, it was held that the taking was continuous so long as the "jumper" pipe was connected to the gas company's main regardless of whether gas was continuously abstracted, and in the *Carlos* case, *supra*, the same result was reached even though the "jumper" was detached from time to time.

RICHARD B. HOFFMAN.

ADMISSIBILITY OF EVIDENCE BY WIRE TAPPING.—[Supreme Court of U. S.] The defendants were tried and convicted of smuggling alcohol, and of the possession and concealment of smuggled alcohol. Of major importance in the conviction was the testimony of federal agents to the substance of an interstate telephone conversation of two of the defendants overheard by means of tapping their telephone wires. The trial court permitted the introduction of this evidence over the defendant's objection. On appeal reversed, two justices dissenting. *Held:* the evidence obtained by wire tapping was not admissible under § 605 of the Communications Act of 1934. 47 U. S. C. A. Sec. 605. This act which provides that ". . . *no person* not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to *any* person . . .," is sufficiently broad to prohibit a federal agent's communication of the contents of a telephone message to a court. The court said that the legislative history to the effect that congress did not intend to limit the activities of federal agents was insuffi-

cient to overbear the plain mandate of the statute which states that "no person" shall engage in the prohibited practice. *Nardone* v. *United States* 58 Sup. Ct. 275 (1937).

As a general rule unless a statute is ambiguous a court will not inquire into legislative intent. Despite the apparently clear meaning of the phrase "no person" sufficient ambiguity would seem to exist to allow an inquiry into the legislative intent in the instant case. It has been held that the word "person" does not in its ordinary and legal significance embrace either the Federal or State government. In re Fox (1873) 52 N. Y. 530. Nor is a statute to be construed to apply to the United States unless there is an express statement to that effect. *Title Guaranty and Surety Co.* v. *Guaranty Title and Trust,* 174 F. 385 (1909); *Dollar Savings Bank* v. *United States* 86 U. S. 227 (1873).

However, it is to be noticed that §605 does not apply to purely intrastate communications. *Valli v. United States,* 94 F. (2d) 687 (C. C. A., 1st, 1938); Cf. *United States v. Bonanzi,* 94 F. (2d) 570 (C. C. A. 2nd, 1938).

However, even if the court had held that the statute didn't prohibit the wire tapping activities of the federal agents, in order for the prosecution to assert that the evidence obtained by wire tapping was correctly admitted by the lower court it would have been necessary for them to establish two additional issues. First, that the testimony was reliable enough to be admitted according to the rules of evidence. Second, that the testimony was not obtained by unlawful search and seizure in violation of the 4th amendment. By excluding the evidence on the basis of the statute the court was not called upon to decide the other issues.

There can be little doubt that testimony obtained by wire tapping would be admissible under the rules of evidence. The admissibility of facts obtained through mechanical devices has been gaining headway in practically all courts. Photographs have been admitted to prove the physical condition of persons or things at a particular time if it can be established that they represent a true picturization. *Lawson* v. *Darter,* 157 Va. 284, 160 S. E. 74 (1931); *Davis* v. *Adrian,* 147 Mich. 300, 110 N. W. 1084 (1907); *Chicago R. Co.* v. *Carson,* 198 Ill. 98, 64 N. E. 739 (1902). It has likewise been held that the evidence of an expert as to the identity of fingerprints is a proper subject for the consideration of the jury. *People* v. *Roach,* 215 N. Y. 592, 109 N. E. 618 (1915); *People* v. *Jennings,* 252 Ill. 534, 96 N. E. 1077 (1911); *State* v. *Lapon,* 101 Vt. 124, 141 Atl. 686 (1928). The latest development in scientific methods of proof, is the lie detector. As yet the results based upon this instrument have not been admitted in evidence to any appreciable extent. See *Frye* v. *United States,* 293 F. 1013 (1923); *State* v. *Bohner,* 210 Wis. 651, 246 N. W. 314 (1933). This is due primarily to the fact that the inventor and his associates, feeling that it is to the public interest, are making every effort to prevent it from being generally admitted. The records produced by phonographs, dictaphones, talking motion picture machines and other similar devices have generally been admitted if the identity of the voices or the parties involved can be established. *Commonwealth* v.

Clark, 123 Pa. Sup. 277, 187 Atl. 237 (1936); *Kidd* v. *People,* 97 Colo. 48, 51 Pac. (2d) 1020 (1935); *People* v. *Schultz,* 18 Cal. Ap. (2d) 485, 64 Pac. (2d) 440 (1937). *State* v. *Heston,* 137 S. C. 145, 134 S. E. 885 (1926). *Contra: State* v. *Simons,* 174 Atl. 867 (1934). Testimony in reference to telephone conversations is uniformly admitted if proper identification of the parties can be established. Where the witness testifying made the call, there is sufficient identification if its proven that the correct number was called and that the party receiving the call claimed to be the party identified. *Thede* v. *Matthews,* 203 Ill. Ap. 507, (1916); *Lord Co.* v. *Morrill,* 178 Mass. 395, 59 N. E. 807 (1901); *Stein* v. *Jasçula,* 165 Wis. 317, 162 N. W. 182 (1917); Where the witness who is attempting to identify the parties to a telephone conversation, was called it is necessary that the witness be able to identify the voice of the party who called. *Mankes* v. *Fishman,* 163 App. Div. 789, 149 N. Y. S. 228 (1914); *Tabor Coal Co.* v. *Cohen,* 189 Ill. App. 190 (1914); *Cox* v. *Cline,* 147 Iowa 353, 126 N. W. 330 (1910). Wire tapping, which is merely a telephone conversation testified to by a witness who was not a party to the conversation, would clearly seem to be admissible if the parties to the conversation could be identified. However, in the absence of statements in the conversation which would identify the parties this requirement might present difficulties.

At an early date the Supreme Court held that evidence obtained in violation of the searches and seizures provisions of the 4th amendment should not be admissible. *Weems* v. *United States,* 217 U. S. 349 (1909). On the second issue of whether the evidence obtained by wire tapping *was* in violation of the searches and seizures provision the case of *Olmstead* v. *United States,* 277 U. S. 438 (1928), would seem to be controlling. In that case the court held by 5 to 4 that telephone conversations were not within the protection of the searches and seizures provisions of the 4th amendment. However, it is to be noted that the 4 judges who dissented in the Olmstead decision, with new additions, now constituted the majority of the court in the instant case, and, of the original majority in the *Olmstead* case only two remain, both of whom dissented in the instant case. In view of this change in the court it seems reasonable to speculate that if the majority had not been able to exclude the evidence on the statutory ground they might have reversed the *Olmstead* case and excluded the evidence on the basis of the searches and seizures provision of the 4th amendment.

BERNARD H. BERTRAND.

FELONY MURDER—INTENT TO COMMIT FELONY AFTER HOMICIDE.—[Penn.] Defendant struck deceased, and thereafter, while deceased (then still living) was lying unconscious upon the ground, removed a package of tobacco from deceased's pocket and $1.35 in money from his hand. Death ensued within a few days as a result of defendant's blows. The Commonwealth alleged that the killing was committed in the perpetration of a robbery. Defendant claimed that he had acted in self defense in striking deceased, and that his intention to steal did not originate

until subsequent to the encounter and after deceased had fallen unconscious to the ground. The jury found him guilty of murder in the first degree and imposed the death penalty. Judgment and sentence of conviction. On appeal affirmed. *Commonwealth* v. *Stelma,* 327 Pa. 317, 192 Atl. 906 (1937).

The Supreme Court held that the prosecution having established by the verdict that the homicide was committed in the perpetration of a robbery, it was deemed to be murder in the first degree, because of the statute which provides that, "All murder . . . which shall be committed in the perpetration of, or attempting to perpetrate any . . . robbery . . . shall be deemed murder in the first degree." 18 Purdon's Pa. Stats. §2221. The court also said the affirmance was proper on the ground that the jury found that defendant was engaged in the perpetration of a robbery when he struck deceased. However, the court said (327 Pa. 317, 321, 192 Atl. 906, 908), "The defendant's argument that the intention to rob originated subsequent to the assault upon the deceased need not be seriously considered in view of the verdict of the jury, moreover, even though such were the case, it is immaterial when the design to rob was conceived, if the homicide occurred while defendant was perpetrating or attempting to perpetrate a robbery. It is generally provided by statute that any homicide committed in the perpetration of, or attempt to perpetrate, either certain named felonies (as in the Pennsylvania statute), or any felony in general, or any act of a felonious nature inherently dangerous to human life, etc., shall be a murder. Under these statutes, the malice necessary to constitute murder is found in the nature of the act upon which the accused is engaged, and no specific intent to kill need be shown. But the killing must occur while the accused is in the course of perpetrating the felonious act in question, however, and that part of the court's statement in the instant case quoted above to the effect that it is immaterial when the design to rob was conceived, may be misleading when not properly qualified.

Where the killing occurs while the accused is actually engaged in the felonious act there is no question that the homicide constitutes murder. Miller, Criminal Law 268. Where the killing occurs after the felony has been completed, there is a well established, though not universally followed, body of law to the effect that so long as the killing is committed within the *res gestae* of the felonious act, it is homicide in the perpetration of a felony. *Commonwealth* v. *Ferko,* 269 Pa. 39, 112 Atl. 38 (1920); *Commonwealth* v. *Lessner,* 274 Pa. 108, 118 Atl. 24 (1922); *Commonwealth* v. *Lawrence,* 282 Pa. 128, 127 Atl. 465 (1925).

A third possible situation, where the killing occurs before the accused has launched upon the course of committing a crime subsequently committed or attempted, is the one in regard to which certain inferences which might be drawn from the statement of the court already referred to are questioned. Where there is as yet no intention to rob, can the accused be said to be engaged in the perpetration of, or an attempt to perpetrate robbery? One of the essential elements of the crime of robbery at common law, and as defined in most statutes, is the felonious intent. Until such intention

can be said to exist, there can be no robbery or attempt to rob. Hence it seems impossible for a killing occurring before the conception of an intent to rob to have occurred in the perpetration of, or an attempt to perpetrate a robbery. The application of the *res gestae* notion in this sort of a case seems impossible, for, unlike the case of a killing occurring after the commission of a robbery, a killing before there was an intent to rob cannot be said to be connected with, or a result of, a general felonious scheme when no such scheme could then exist. A contrary argument might possibly be made upon the basis of the statute in Pennsylvania which, after defining robbery much the same as it was defined at common law (18 Purdon's Pa. Stats. §2892), defines robbery under aggravating circumstances thus: "If any person . . . shall rob any person, and . . . immediately before . . . such robbery, beat, strike, or ill-use any person, or do violence to such person, the person so offending shall be guilty of felony . . ." (18 Purdon's Pa. Stats. §2892). The argument based upon this statute would be to the effect that the legislature has expressly provided that a violent attack upon the victim immediately prior to robbing him shall be deemed part of the offense, that is, that the legislature has in effect expressly enacted that the *res gestae* notion shall apply in such a case, to make the attack upon the victim prior to the robbery a part of the scheme. It must be noted, though, that this statute does nothing to qualify the requirement of intent as an essential element of the crime, nor does it contain any expression to the effect that the violence done to the victim may be done before the inception of an intent to rob. The purpose of this statute was to provide for a greater penalty in the case of robberies of an aggravated kind, and it would no doubt attach the greater penalty to a robbery conceived for the first time immediately after an attack upon the victim. But that is not to say that the statute makes the attack a part of the robbery in the sense that the attacker could be said to be engaged in the perpetration of a robbery before he had an intent to rob. The statute in such a case merely says that it is a worse crime to rob a person immediately after doing violence to that person than where the robbery is committed without violence. The court in the instant case makes no mention of the robbery statutes, nor does it refer to any of the cases thereunder. An examination of the cases under the robbery statute in question shows that the problem has never been dealt with in Pennsylvania.

The question here dealt with, whether a killing committed before an intention to commit a felony (subsequently committed) has been conceived is felony murder, is one which, as a practical matter, the courts meet only upon very rare occasions. In the first place, where a man kills another, it is not often that he then, for the first time, decides to commit some other felony. Usually, if he is not already engaged in the commission of some other crime, a man who unintentionally or otherwise kills another will not under such circumstances conceive of the commission of some other crime. In the second place, where such a state of facts actually exists, the burden of proving them may well be insurmountable. A

jury, where a man has assaulted another, and later, after the other is dead or dying, steals from him, will be most skeptical when the accused pleads that he had no intention to steal until after the attack had been consumated. The thought occurring to the mind of the third party that the assault was engaged in for the purpose of getting the property later stolen, is a hard one to rebut under such circumstances.

EUGENE H. DUPEE, JR.

PRINCIPAL AND ACCESSORY—CONVICTION OF PRINCIPAL BEFORE TRIAL OF ACCESSORY.—[Mass.] The common law distinguished the crime of an accessory from that of a principal and this distinction constantly emerges from its alleged dormant state to plague legislators who have attempted to alter the common law. Even in its embryonic stage the distinction began to be looked upon as an illegitimate child impeding the proper administration of justice. A major premise at common law was that the guilt of the principal was imputable to the accessory before the fact. Therefore, the conviction of the accessory was to depend upon the conviction of the principal as a condition precedent and necessarily had to be of the same grade of offense. 1 Wharton on Criminal Law 12 ed. §270 Consistently, the acquittal of the principal acquitted the accessory *per se* (1 Bishop Criminal Law 9 ed. §666-7); and without conviction no judgment could be pronounced against the accessory. Death, a pardon, or failure of apprehension of the principal would serve to defeat the carriage of justice for the accessory could be tried before the principal only if he consented. 23 Jour. of Criminal Law 107, 1042. The principal and accessory could be indicted and tried together, but the jury would be instructed to pass just on the guilt of the principal and if he was acquitted to discharge the accessory. If the principal was guilty they would inquire into the guilt of the accessory. *People* v. *Jordon*, 244 Ill. 386, 91 N. E. 482 (1910); 10 Neb. L. Bul. 170. On the other hand if the principal were tried first and found guilty, the conviction of the principal was not binding on the accessory who had a right to re-try the principal's guilt. The conviction of the principal was, however, *prima facie* evidence of the principal's guilt in the accessory's trial and the burden was upon the accessory to overcome this presumption. *Contrell* v. *State*, 141 Ga. 98, 80 S. E. 649 (1913); *State* v. *Fiore*, 85 N. J. L. 311, 88 Atl. 1039 (1913); *State* v. *Chittem*, 13 N. C. 49 (1828).

Almost universally the legislators have attempted to make the offense of an accessory an independent and substantive crime and as a necessary consequence to allow the accessory to be tried independently of the principal. Typical statutes passed by legislatures are the Illinois and Massachusetts statutes which provide, that the accessory can be indicted and convicted, ". . . whether the principal is convicted or amenable to justice, or not . . ." (Ill. State Bar Stats., c. 38, §583) or ". . . whether the principal felon has or has not been convicted or is or is not amenable to justice . . . ." Mass. G. L. (Ter. ed.) c. 274, §3. In view of the fact that the statutes have two clauses, first, whether the principal is convicted or not and, second, whether amenable to justice or not, the

legislators obviously intended that the actual apprehension, conviction or acquittal of the principal should have no effect on the accessory's trial and the accessory should be convicted if at his trial the state could prove that there was a guilty principal and he was an accessory to that principal. A few courts have allowed the conviction of the accessory when the principal has been acquitted by reasoning that the jury in the accessory's trial had found that the principal was guilty even though the jury in the principal trial had acquitted him. *Reed* v. *Commonwealth,* 125 Ky. 126, 100 S. W. 856 (1907); *Thomas* v. *State,* 267 Pac. 1040 (Okla., 1928); *Fleming* v. *State,* 142 Miss. 872, 108 So. 143 (1926). Despite the fact that this seems to be the logical result from reading the statutes most courts have been reluctant to convict an accessory of a crime when the principal has been acquitted. *State* v. *St. Philip,* 160 La. 468, 125 So. 457 (1929); *People* v. *Wyherk,* 347 Ill. 28, 178 N. E. 890 (1932); and cases cited by Sears (1931) 25 Ill. L. Rev. 845. These courts undoubtedly have been moved by the same logic which was instrumental in developing the common law, e. g., an accessory can't exist without a guilty principal. In support of these cases it has been argued that the legislatures only intended to cover the situation where the principal is not amenable to justice and not the situation where the principal is acquitted. To rebut this argument it is only necessary to point out that the statutes have two clauses one of which specifically takes care of the situation where the principal is not amenable to justice and the second, e. g., whether convicted or not, would seem to cover the situation of an acquittal. If the suggested interpretation were adopted the second clause would become meaningless.

It is generally believed that the statutes by attempting to make the result of the trial of the principal irrelevant when the accessory is being tried impose a greater hardship on the accessory because he is not allowed to take advantage of a principal's acquittal. It should not be overlooked, however, that the modern statutes can aid an accessory when the principal is convicted. At common law when the principal was convicted, on the accessory's trial the state was aided by a *prima facie* case. If the principal's trial is to be irrelevant for one purpose it should be for another and by following the modern statutes the state should not be granted the benefit of a *prima facie* case after the principal is convicted. A recent Massachusetts case demonstrated this advantage to the accused, who notwithstanding this advantage was found guilty. The principal, in financial straits, acquired a large number of insurance policies. The defendant who was the son of the principal was made beneficiary in all of these policies. Insured in amounts far in excess of his resources, the principal aided and abetted by the defendant devised a plan to materialize on the insurance policies. The principal lured an inebriated man into his car, drove to a secluded spot and there beat the victim into a state of unconsciousness with an iron bar. As the man lay prostrate in the machine, the principal saturated the upholstery with gasoline and ignited it. The unfortunate derelict was burned beyond recognition and died as a result of monoxide poisoning. In accordance

with previous plans, the principal remained in hiding, waiting for the payment of his life insurance policies to his son. Both were apprehended and were tried together as principals. On the trial as principals a directed verdict was returned in favor of the accessory. The principal, however, was found guilty of murder in the first degree. *Commonwealth* v. *Di Staccio*, 1 N. E. (2d) 191. Subsequently the defendant was found guilty as accessory before the fact to a murder. Nevertheless the accessory was allowed to retry the principal's guilt and the burden of proving the principal's guilt in the accessory's trial remained on the state. *Commonwealth* v. *Di Stasio*, 11 N. E. (2d) 799 (Mass., 1937).

JAMES V. CUNNINGHAM.